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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1041

JAMES CARLISLE BASKIN,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

MARION W. SEABROOK,
Counsel for Petitioner.

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vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Petition.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, James Carlisle Baskin, respectfully presents to this Court his petition for a writ of certiorari addressed to the Honorable Court of Claims of the United States, commanding said Court and the Clerk thereof to certify to this Court the record and proceedings of the case in said Court wherein your petitioner was plaintiff and the United States was defendant, No. 45,522, together with its opinion therein, for the review and determination of said cause by this Court.

Summary or Statement.

On August 1, 1941, Petitioner brought suit in the Court of Claims to recover from the United States $6,845 as salary in the position of Penitentiary Guard at the rate of $1,680 per annum from January 15th, 1936 after deducting $2,605 earned in private employment subsequent to that date.

The Government moved the Court of Claims to dismiss plaintiff's petition on the ground that it failed to set forth a cause of action within the jurisdiction of that court. The Judgment of the Court of Claims, rendered January 5, 1942, sustained this motion, which was in the nature of a demurrer to the petition.

The facts of the claim are stated in the opinion of the Court in considerable detail, so we will limit the statement here to the essentials.

The Petition in the Court of Claims.

The petition alleges that plaintiff served in the United States Army as a first Lieutenant from August 31, 1917 to July 18, 1919, when he was honorably discharged. From March 1, 1928, he was employed in the United States Prison Service, Department of Justice, under the Warden of the United States Penitentiary at Lewisburg, Pa., having been appointed to that service and duly qualified after examination, in accordance with the regulations of the Civil Service Commission. That as a classified employee in the Civil Service he was entitled to the protection of the provision in Section 6, Act of August 24, 1912 (Sec. 652 of Title 5 of the United States Code), requiring that removals from the classified services be only for cause.

That section provides that no person in the classified Civil Service

> "shall be removed therefrom except for such cause as will promote the efficiency of said service and for rea-

sons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof." etc.

We respectfully submit that the petitioner has been deprived of his office in violation of this statute. The following pertinent provision also appears therein:

> "The right of persons employed in the Civil Service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with."

The petition then further alleges that plaintiff was an honorably discharged soldier, and that plaintiff was entitled to the protection of the provision in Title 5, Section 648 that in the event of reductions being made in the force of the executive departments, no honorably discharged soldier whose record in said department which is rated good shall be discharged or dropped or reduced in rank or salary.

It further alleges that on September 3, 1935, while serving as a Guard in the United States Penitentiary at Lewisburg, Pa., at a salary of $1,680 per annum the plaintiff received a formal notice of suspension from the Warden of that institution upon the charge of "having written letters to officials of the Government, criticizing the administration of Prison affairs." That he promptly submitted a sworn reply to said charge, stating that the letters were written by him properly and in good faith and did not violate the rules, but he was nevertheless suspended without a hearing and never permitted to resume his duties.

That on or about October 4, 1935 he wrote the Director of the Bureau of Prisons a letter expressing his regret of the

mistake he had made in writing the letters criticizing the prison administration. To this, on October 8, 1935, the Assistant Director of the Bureau replied to the effect that the Director *had accepted his explanation* and was willing to give him the best letter or recommendation he could consistently issue; and suggested that if plaintiff would send to the Bureau his application for leave without pay, they would arrange to terminate his suspension; with the understanding that while he would officially be a part of the prison service, he would not report back for duty at Lewisburg, but retain the status of an employee on leave without pay, pending efforts to secure a transfer to some other branch of the service.

The petition sets out this letter of recommendation, outlining the good record of plaintiff in the service and concluding with these words:

> "during this period of employment he has rendered faithful, conscientious service. Reports from his Superior officers show him to be a competent employee" (R. 8).

The petition further alleges his compliance with the Assistant Director's suggestion; and a letter from the Director to the Warden at Lewisburg containing the following condoning statement: "We consider that the discipline administered Mr. Baskin through the medium of the suspension * * * is sufficient * * *."

It is further alleged that after fruitless efforts to obtain a transfer to some other branch of the service the plaintiff sought reinstatement as a prison Guard. Rebuffed, he consulted legal counsel. (Different from the one now representing him.) That in response to a request for pertinent information, his counsel was abruptly advised by the Assistant Director in a letter dated January 15, 1936, "that the plaintiff's time is now up, and his appointment is, there-

fore, being terminated for the good of the service." That the plaintiff was then dropped without notice of any new charge, and without any opportunity whatever to answer in writing or otherwise, and without being given the statutory protection above cited.

That, in September, 1937, the plaintiff filed suit in the District Court of the United States for the Eastern District of South Carolina. The suit was dismissed on April 6, 1940, for lack of jurisdiction, the Court being of the opinion that the plaintiff was an officer of the United States within the meaning of that portion of the Tucker Act in which the District Courts are denied concurrent jurisdiction with the Court of Claims of cases brought to recover salaries of officers. That immediately after dismissal of the said suit the plaintiff sought to obtain counsel for the prosecution of the matter before the Court of Claims. That "he was unsuccessful in his efforts until now." (the time of preparation by his Washington Counsel of his petition in the Court of Claims).

Action of the Court of Claims.

The Court of Claims has, in effect, sustained a demurrer to this petition, and thereby denied the plaintiff a trial on the merits, basing this decision upon the following basic propositions, the soundness and legality of which are questioned by this petition for certiorari, to wit:

(1) That the action of the Government officials was in accordance with the statute (Title 5, Section 652, U. S. Code) and the regulations of the Civil Service Commission and is not subject to review by the Court of Claims.

(2) That the termination of plaintiff's suspension, leaving him in the status of an employee on leave without pay, did not give the plaintiff the right to demand

the position from which he had been removed, or the pay thereof.

(3) That the termination "for the good of the service" of plaintiff's appointment was clearly not illegal.

(4) That at the time plaintiff's appointment was terminated on January 15, 1936, he was not holding any position in the Government service from which he was entitled to pay compensation.

(5) That plaintiff was guilty of *laches* after January 15, 1936, in asserting his claim.

(6) The fact that plaintiff was an honorably discharged soldier does not under the facts of this case affect the decision.

Reasons Relied on for the Allowance of the Writ.

Bearing in mind the principles enunciated in such cases as *Leimer* v. *State Mutual Life Insurance Co.*, 108 F. (2d) 302, that there is no justification for dismissing a petition for insufficiency except it appears *to a certainty* that plaintiff would be entitled to no relief under *any state of facts* which could be proved thereunder, we shall, in the order above shown, respectfully endeavor to show the fallacies of the positions on which the honorable Court's decision rests, to wit:

(1)

Did the Government officials act in accordance with Title 5, Section 652, of the United States Code and the regulations of the Civil Service Commission, in either the first suspension or the final dismissal? They did not. The Statute says:

> *"No person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service."*

Was it not defensive matter to have been set up in and proved under an Answer that the removal was for such cause as would promote the efficiency of said service? Where does it appear on the face of the petition to justify the sustaining of a demurrer thereto that plaintiff's suspension in September 1935, much less the final discharge on January 15, 1936, would have in any wise promoted *the efficiency of the service* as the statute requires? True, the Assistant Director's arbitrary fiat of January 15, 1936, is quoted about the appointment being terminated "for the good of the service;" but there is no such allegation at all with reference to the *suspension;* and, as to the *discharge,* there is a distinction between the phrase, "*for the good of the service,*" and the clause, "*as will promote the efficiency of the said service.*" used in the Statute. It may be "for the good of the service" to maintain the immunity of superiors from the criticisms of their subordinates, however just and well founded; but Congress, in its wisdom, did not adopt that as the yardstick by which dismissal may be merited and there is no law or regulation which inhibits proper criticism. To justify dismissal the cause must have been such "*as will promote the efficiency of the said service*;" and how could the Court of Claims have known from a mere pleading, and without hearing the evidence, that the criticism here involved was not directed into lawful channels and itself calculated to promote the efficiency of the said service? Truthful, just and constructive criticism, free from slander, such as this was, always tends to promote efficiency. Congress recognizes that in this very statute itself, which invites and allows petitions to the Members of Congress. Only a hearing on the evidence can reveal that the letters written by the plaintiff did not come up to these standards.

There was no charge of incompetency or neglect of duty on the part of the plaintiff here, such as there was in

most of the cases cited by the Court of Claims. There is no need here to review the action of Government officials vested with jurisdiction in the matter of suspension or discharge of an employee charged with delinquency; but here only are pure issues of law: (a) did the officials have the legal power to suspend or discharge in the manner employed; (b) were not the reasons assigned by them on their face totally insufficient *as a matter of law,* and subject themselves to demurrer or dismissal without the consideration of evidence in support of the charges being necessary; and (c) did the officials who suspended and then discharged this petitioner have any statutory or constitutional power to do so at all?

(a)

Title 5, Section 652 of the U. S. Code, further provides:

> *"No person in the classified civil service of the United States shall be removed therefrom except • • • for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him • • • and also be allowed a reasonable time for personally answering the same in writing,"* etc. etc.

Where are the reasons required by the statute in the dismissal of January 15, 1936? Surely the arbitrary fiat, above shown to be insufficient, will not do. Things have not come to such pass in this free land of ours that a sufficient reason may be found in the plaintiff's having consulted counsel.

No answer was then allowed. Judgment came on the wings of the warning! Pre-judged, the sentence of dismissal anticipated and made useless the defense.

(b)

> *"The right of persons employed in the civil service of the United States either individually, or collectively, to petition Congress, or any Member thereof, or to furnish information to • • • any • • • member thereof shall not be denied or interfered with."* Sec. 652, *supra.*

We respectfully submit that the honorable Court of Claims erroneously shut off the possibility of proof by the plaintiff that the original suspension was illegal if it should appear from the evidence that the offense for which he was suspended consisted mainly of communicating with Members of Congress. The allegations of the petition were ample to let in evidence that what he did consisted mainly of writing members of Congress.

Therefore, we respectfully submit, under the rule that pleadings should be given a liberal construction, if it should appear from the evidence on trial that the dismissal of plaintiff was largely or mainly motivated by his having laid his complaints or alleged criticisms before Members of Congress, the original suspension of plaintiff would have been an illegal act and void act, violative of Title 5, Section 652.

The Court was patently in error in this regard in saying that the action of the Government officials was in accordance with the regulations of the Civil Service Commission. From a bulletin issued by that body bearing date April 1934, being form 505, entitled "REMOVAL, REDUCTION, SUSPENSION, AND FURLOUGH" we quote below section 33 on the subject of "CAUSES FOR REMOVAL". From this it may be plainly seen that the writing in good faith of critical but truthful letters to the proper officials has never been treated as a valid ground of removal or suspension. Only the intentional making of a *false* statement is recognized

as a reason which shall be a good cause for removal. There is no hint here that any statement made by this Petitioner was intentionally false.

The section above mentioned is as follows:

"CAUSES FOR REMOVAL

"33. The removal statute provides that 'No person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service.' What constitutes sufficient cause is a matter in the discretion of the removing officer, but it must be substantial and must be a cause touching the qualifications of the person removed or the performance of his duties, showing that he is not a fit or proper person to hold the office,[10] separation on account of reduction in force and for similar reasons not being regarded as removal within the meaning of the statute. Some of the reasons which shall be good cause for removal are enumerated in the civil-service rules, as follows: Physical or mental unfitness for the position which the officer or employee holds; criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct; *intentionally making a false statement in any material fact*, or practicing any deception or fraud in securing examination, registration, certification, or appointment, refusal to furnish testimony as required by rule XIV; the habitual use of intoxicating beverages to excess; consenting to a recommendation for his promotion from a person other than one under whose supervision the employee has served. Political activity in violation of the civil-service rules and Executive orders is punishable by removal or other disciplinary measures, in proportion to the gravity of the offense. Violation of the political assessments provisions of the Civil Service Act prohibiting the solicitation or receipt of political contributions by one officer or employee from another, the solicitation by any person of political contributions in Federal buildings, discrimination because of political contributions, and the making of a political contribution by one officer

or employee to another,[11] are felonies and are punishable by fine or imprisonment, or both, as well as by removal from the service. (See Form 1236, Political Activity.) The fact that any officer or employee is found directly or indirectly engaged in instructing, or is concerned in any manner in instructing any person with a view to his special preparation for civil-service examinations or for the diplomatic and consular examinations is sufficient cause for his removal from the service."

(2)

The second basic ground assigned by the court is fully answered with the proposition that, as above shown, the suspension itself was illegal. It may be true that a civil service employment is not a contract; but the power of removal is restricted by statute, and to that extent can not be exercised. Since the statute was violated, there was no removal at all, and plaintiff was never out of his position, and was entitled to the pay thereof. If there were any offense in the first instance, it was fully condoned; hence the specification in writing of an entirely new offense was necessary to validate the removal on January 15, 1936, and that was not done.

The District Court of the United States for the Eastern District of South Carolina had adjudicated that this identical petitioner was an officer of the United States. *Baskins* v. *United States*, 32 Fed. Supp. 518. The government was a party to that adjudication and the Court of Claims was bound to have taken judicial notice of it. Since, as *res adjudicata*, the petitioner was an officer, and since his removal was totally illegal, the second position of the Court of Claims, that his suspension, leaving him in the status of an employee on leave without pay, did not give him the right to demand the position from which he was removed, is completely met by decisions of the Supreme Court, such as *United States* v. *Perkins*, 116 U. S. 483,

29 L. Ed. 700, 6 S. Ct. 449, and *United States* v. *Wickersham*, 201 U. S. 390, 50 L. Ed. 798, 26 S. Ct. 469, by decisions of the Court of Claims itself and by cases from other jurisdictions, all of which will be more fully demonstrated in our subjoined brief.

(3)

That terminating plaintiff's employment on grounds stated to be "for the good of the service" was illegal has been demonstrated under our treatment of the Court's basic ground No. 1 above, and need not be repeated here.

(c)

But, as the Court of Claims has denominated this termination of plaintiff's employment as "clearly not illegal," we respectfully submit that its illegality and the honorable Court's error may be pivoted upon further statutory and constitutional grounds that are irrefutable, to wit:

Plaintiff's suspension came through the medium of the Warden of the United States Penitentiary at Lewisburg, Pa. (R. 1), the Assistant Director of the Bureau of Prisons and the Director himself (R. 2, 3). His final dismissal of discharge came from the Assistant Director (R. 3). Did those officials, or any of them have the legal or constitutional right of removal?

The Act of Congress of May 14, 1930, c. 274, section 1, appearing as Section 753 of Title 18 of the United States Code reads as follows, to-wit:

> "There is established in the Department of Justice, a Bureau of Prisons, to be in charge of a director, who shall be paid a salary at the rate of $10,000 a year, *and shall be appointed by and serve directly under the Attorney General.* The officers and employees of the existing office of the Superintendent of Prisons; all official records, furniture and supplies; and all of the au-

> thority, powers, and duties conferred by law or regulation upon the Superintendent of Prisons or any of his subordinates are hereby transferred to the Bureau of Prisons. *The Attorney General shall have the power to appoint such additional officers and employees as may be necessary.*" (Emphasis added.)

Prior to the Act of May 14, 1930, above quoted, "the existing office" of the Superintendent of Prisons was dependent upon the Act of Congress of March 3, 1891, C. 529, Section 4 (26 Stat. 839), as found in Section 10555 of United States Compiled Statutes, 1916, Volume 10, page 13019, which reads as follows:

> "That the control and management of said prisons be vested in the *Attorney-General, who shall have the power to appoint a superintendent, assistant superintendent, warden, keeper, and all other officers* necessary for the safe-keeping, care, protection, and discipline of such United States prisoners." etc. etc. (Emphasis added.)

The plaintiff here was appointed by the Attorney General. *Baskins* v. *United States*, 32 Fed. Supp. 518, 520.

These sections confer the power of appointment solely on the Attorney General; and no such power is vested in the Director of the Bureau of Prisons, or in his Assistant or in any Warden of a Prison. *It is axiomatic that the power of appointment to office carries with it the power of removal.* Hence, the Attorney General alone could have removed Baskin, and the action attempted by the Warden at Lewisburg, the Assistant Director and by the Director were utterly null and void. Can one appointee of the same power remove another appointee?

If the declaration of the Court of Claims is sound that the termination of the plaintiff's employment was "clearly not illegal;" meaning, we assume, in accordance with statute, then these statutes we respectfully submit, are uncon-

stitutional; because Article II, Section 2, Clause 2, of the Constitution stipulates:

> "but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the Courts of law, or *in the Heads of Departments.*" (Emphasis added.)

Thus, only may a Cabinet officer appoint, the Attorney General in this instance; and, we respectfully submit, he alone could remove.

(4)

For its fourth basic ground of decision the honorable Court of Claims took the view that at the time plaintiff's appointment was terminated, he was not holding any position in the Government service from which he was entitled to any compensation. This is fully answered above, because plaintiff was never removed or even suspended legally or constitutionally. Moreover, the very reason for which his action in the United States District Court for the Eastern District of South Carolina was dismissed was an adjudication that he was or had been an officer of the United States.

The case comes to this: the plaintiff by his appointment as an officer was entitled to the privileges and emoluments of his position. The attempted dismissal without authority of law, he remaining ready and willing to discharge the duties of the place, could not during the period thereof, have the effect to deprive him of the compensation legally belonging to one entitled to hold the position; and it was legally recoverable in the Court of Claims.

United States v. *Wickersham*, 201 U. S. 392, 399, 50 L. Ed. 798, 801;

McLean v. *United States*, 45 Ct. Cl. 95.

(5)

Your petitioner respectfully submits that the honorable Court of Claims erred in charging the plaintiff with *laches* in the prosecution of his claim after January 15th, 1936; because his petition in the Court of Claims shows that, within a reasonable time thereafter, he filed suit in the District Court of the United States for the Eastern District of South Carolina; and, regardless of the outcome of that effort on plaintiff's part, it at least showed that he was pressing the matter with diligence, and to the best of his knowledge as to how to proceed; and at least adjudicated that he had been an officer, an essential point in this case.

We further respectfully submit that the Court of Claims was in error in applying the doctrine of *laches* to this case at all, because that is strictly an equitable doctrine, which is shown by the very authority cited by the Court in support of its application here; whereas this is absolutely an action at law, wherein such doctrine has no place whatever, and is governed by the statute of limitations, which allows six years in which suit may be brought. Title 28, Section 262 of the United States Code. The plaintiff brought his suit amply within the statute.

As above stated, the *Arant* case, cited by the Court of Claims, itself plainly shows that *laches* is purely equitable; and we have not been able to find any case which adjudicates against our position that in a *law case*, such as this is, *laches* can oust the operation of the statute of limitations; for if that were so, the Court would be exercising a veto or repealing power that it does not possess.

In our subjoined brief we will more fully demonstrate that the Court of Claims, like all other courts of exalted jurisdiction, administers, or should administer, legal and equitable jurisprudence under the rules which separate the two, notwithstanding the power of most modern courts to administer both.

It might be correct to say that the fact that plaintiff was an honorably discharged soldier would not affect this case, if it was merely a matter of the Court's being asked to review the action of executive officers of the Government in suspending or removing a subordinate for some legally valid charge, such as misconduct or inefficiency. But, there being no deficiency charged up to plaintiff here, as there was against the claimants in the cases cited by the Court, and as required by Title 5, Section 648, of the Code to justify a dismissal, his status as an honorably discharged soldier *does* come to his aid under the *spirit* of that section; which is to protect the honorably discharged soldier whose record is not legally impugned.

We see no need to stress the supposed issue of which the Defendant's Counsel in the Court below seem to have made much, which was that plaintiff's suit for accrued salary seeks to try his right and title to office, and that the Court of Claims was without jurisdiction to try such an action. The obvious answer is that the Court of Claims paid no attention whatever to this supposed issue, and said nothing about it. On the contrary, it decided the case as though it had jurisdiction, which we think was eminently correct. We will advert to a few authorities in the brief to show that the Court did have jurisdiction, but we believe this unnecessary for the further obvious reason that trial of title to office, as usually found in proceedings *quo warranto*, only arises where there are two contenders for it. Nothing of the kind appears here. This is merely a suit for salary, and no other person's right to the office is involved.

Your petitioner amplifies his grounds in and by his brief which is subjoined to this petition, reference to which is craved.

Your petitioner presents herewith a certified copy of the entire record in said cause, including the proceedings in the Court of Claims and the opinion of the said Court, and states that the record below reposes in the said Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court directed to the Honorable Court of Claims of the United States, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings had in this cause, to the end that the said cause may be reviewed and determined by this Honorable Court as provided by law; and that the judgment of the said Honorable Court of Claims may be reversed by this Honorable Court; and for such further relief as may be proper.

And your petitioner will ever pray, etc.

MARION W. SEABROOK,
Sumter, S. C.,
Counsel for Petitioner.

STATE OF SOUTH CAROLINA,
County of Sumter:

Personally appeared before me J. C. Baskin, who, being duly sworn, says that he is the Petitioner above named; and that he has read the foregoing Petition for Writ of Certiorari; and that the same is true to the best of his knowledge and belief.

JAMES CARLISLE BASKIN.

Sworn to before me this 12th day of March, 1942.

MARION MOISE, [L. S.]
A Notary Public in and for South Carolina.

[NOTARIAL SEAL.]

My commission expires at the pleasure of the Governor of South Carolina.

BRIEF IN SUPPORT OF PETITION.

To the Honorable Supreme Court of the United States:

Petitioner respectfully submits to this Honorable Court the following brief in support of his petition for a writ of certiorari.

The Opinion of the Court Below.

It is not yet reported.

Jurisdictional Statement.

The Court of Claims has sustained the defendant's motion to dismiss plaintiff's petition for a monetary judgment, and dismissed it (R. 11); hence there is a final judgment adverse to the petitioner, reviewable by certiorari under Title 28, Section 288 (b) and (c) of the United States Code. This judgment was dated and entered January 5th, 1942 (R. 11).

Statement of Case.

The essence of the allegations of the petition are:

(1) That plaintiff is an honorably discharged Veteran of the United States in World War I; that for about eight years beginning in 1928, he was employed in the United States Prison Service, Department of Justice, having been appointed, after examination, in accordance with Civil Service Regulations. As a classified employee in the civil service he was entitled to protection of Section 652, Title 5, of the United States Code, requiring that removals from the classified service be only for cause; and was also entitled to the protection of the provision in Title 5, Section 648, that in the event of reductions made in the force in any of the executive departments no honorably discharged

soldier whose record is rated good shall be discharged or reduced in rank or salary.

(2) That on September 3, 1935, while serving as guard at the United States penitentiary at Lewisburg, Pa., at a salary of $1,680.00 per annum, the plaintiff received a formal notice of suspension from the warden; upon a charge of "having written letters to officials of the Government, criticising the administration of prison affairs." He promptly filed a sworn reply stating that the letters were written properly and in good faith and not in violation of Rule XII of the Civil Service Commission. The plaintiff was nevertheless suspended, without a hearing, and was never permitted to resume his duties.

(3) That on or about October 4, 1935, plaintiff wrote the Director of the Bureau of Prisons a letter expressing his regret of the mistake he had made in criticising the prison administration; and received in reply a letter, dated October 8, 1935, from the Assistant Director of the Bureau accepting his explanation and offering him a letter of recommendation; and further stating that if he would send his application for leave without pay, the Bureau would arrange to terminate his suspension, with the understanding that while he would be officially a part of the Prison Service, he do not report back for duty at Lewisburg, but retain the status of an employee on leave without pay pending his efforts to secure a transfer to some other branch of the service. This letter of recommendation set out his record of service; and stated that during this period of employment he had rendered faithful, conscientious service; and that reports from his superior officers show him to be a competent employee.

(4) That in accordance with the above the plaintiff applied for leave without pay; and letter from the Assistant Director to the Warden of the Penitentiary at Lewisburg

at that time stated that the Bureau considered the discipline administered Mr. Baskin through the medium of the suspension was sufficient.

(5) That after a fruitless effort to obtain a transfer to some other branch of the service, plaintiff sought reinstatement as a prison guard. Rebuffed, he consulted legal counsel. In response to a request for pertinent information, his counsel was abruptly advised by the Assistant Director, in a letter dated January 15, 1936, that the plaintiff's "time is up now, and his appointment is, therefore, being terminated for the good of the service."

Notwithstanding the statement previously written by the Assistant Director that the discipline of suspension was considered sufficient for the offense of having criticised the administration of prison affairs, the plaintiff was thus dropped from the service without notice of any new charge, except possibly, by implication, the charge of having consulted a lawyer, and without any opportunity whatever to answer in writing or otherwise as required by the statute.

(6) That the plaintiff was thereafter advised that his appropriate course for justice was to the District Court of the United States for the Eastern District of South Carolina. Suit was filed in that Court in September, 1937. The suit was dismissed on April 6, 1940, for lack of jurisdiction, the Court being of the opinion that the plaintiff was an officer of the United States within the meaning of that portion of the Tucker Act in which the District Courts are denied concurrent jurisdiction with the Court of Claims of cases brought to recover salary of officers. Immediately after the dismissal of the said suit the plaintiff sought to obtain counsel for the prosecution of the matter before the Court of Claims. He was unsuccessful until the time of his petition therein.

(7) Alleges in part that the efforts made by plaintiff in good faith to obtain a transfer to another branch of the civil service failed.

The prayer is for judgment for $6,845.00 salary from January 15, 1936, after deducting $2,605.00 earned in private employment.

The Court of Claims has in effect sustained a demurrer to this petition as failing to set forth a cause of action within its jurisdiction. This was on certain basic propositions hereinafter discussed in the order used by the Court. In doing this, however, the Court seems to have overlooked the principle set forth in such cases as *Leimer* v. *State Mutual Life Insurance Co.*, 108 F. (2d) 302, that there is no justification for dismissing a petition for insufficiency except it appears to *a certainty* that the plaintiff would be entitled to no relief under *any state of facts* which could be proved thereunder. We believe that this principle should be constantly kept in mind in the consideration of this matter.

ARGUMENT.

The following is a summary of the points upon which the decision below turned, and which are questioned here, to wit:

(1) That the action of the Government officials was in accordance with the statute (Title 5, Section 652, U. S. Code) and the regulations of the Civil Service Commission, and is not subject to review by the Court of Claims.

(2) That the termination of plaintiff's suspension, leaving him in the status of an employee on leave without pay, did not give the plaintiff the right to demand the position from which he had been removed, or the pay thereof.

(3) That the termination "for the good of the service" of plaintiff's appointment was clearly not illegal.

(4) That at the time plaintiff's appointment was terminated on January 15, 1936, he was not holding any position in the Government service from which he was entitled to any compensation.

(5) That plaintiff was guilty of *laches* after January 15, 1936, in asserting his claim.

(6) The fact that plaintiff was an honorably discharged soldier does not under the facts of this case affect the decision.

(1)

The Bureau of Prisons did not act in accordance with statute, but violated it in both the original suspension and the final dismissal. Title 5, Section 652, of the Code provides:

> "No person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service."

It was defensive matter to be set up in an Answer and proved thereunder that this removal was for such cause as would promote the efficiency of said service. This was matter in justification of the discharge of the employee, hence had to be pleaded in an Answer.

The burden of proving a sufficient cause for the discharge was on the Master.

39 Corpus Juris, page 101, paragraph 120.

It is true, the Assistant Director's arbitrary fiat of January 15, 1936 is quoted from his letter on the face of the petition, wherein he spoke of the appointment being terminated "for the good of the service;" but there is no such statement on the face of the complaint in reference to the original suspension of Baskin; and even as to the final dis-

charge there is a distinction between the phrase, "for the good of the service," and the clause, "*as will promote the efficiency of the said service.*" It may be "for the good of the service" to maintain the immunity of superiors from the criticisms of their subordinates, however just and well founded that criticism may be; but Congress did not lay that down as a ground for dismissal; and there is no law or regulation which inhibits proper criticism. This is in line with the constitutional right of free speech.

Had the letters and alleged criticisms attributed to the plaintiff been, or even alleged to have been, false or defamatory, the dismissal would have been legal, for, as said by the United States Court of Appeals for the District of Columbia, in *Levine* v. *Farley*, 107 F. (2d) 186, 190:

> "Obviously, therefore, if the charges against the postal officials were false, publication in the newspapers for the purpose of intimidation or of bringing pressure to bear on officials whose duty it was to preserve the efficiency of the service, was conduct tending to disrupt the service; and in this view, the only question for decision is whether a Court may go behind the official findings of the postal authorities and try the questions of fact all over again. We think the rule is that this cannot be done."

The Court was quite correct in this; but in the present case there is no hint that anything this plaintiff wrote was in any degree false or defamatory, and the Court is now confronted with the question as to whether they may not go behind the acts of the authorities, where the only showing before the Court is that the alleged offender did nothing beyond what it was his legal and constitutional right to do; and the Director's office, apparently irked by his communications and his later communicating through counsel, seem to have let animus direct their course.

Moreover, we respectfully submit that neither the Warden of the Penitentiary at Lewisburg, Pa., nor the Assistant Director of Prisons, nor even the Director himself, had any legal authority to terminate petitioner's appointment under the Civil Service rules. The Act of May 14, 1930, c. 274, section 1, appearing as section 753, Title 18, of the United States Code, is quoted on pages 12 and 13 of the petition for certiorari, followed on the next page with the Act of March 3, 1891, c. 529, Section 4 (26 Stat. 839). These Acts vest the power of appointing prison officials exclusively in the Attorney General.

Ordinarily none but the President has the power to appoint, except that in Article II, Section 2, Clause 2 of the Constitution it is written: "but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the Courts of law, or *in the heads of Departments.*" So that the above quoted acts would have been unconstitutional, had they vested the right of appointment in any one else than the Attorney General, or some other "Head of a Department," to wit: a Cabinet officer.

These statutes confer no power of dismissal upon an assistant Director, nor indeed upon the Director himself. It is an old and familiar doctrine that the power of appointment to public office carries with it the power to remove. *Burnap* v. *United States*, 252 U. S. 512, 64 L. Ed. 692, 40 S. Ct. 374; *Levine* v. *Farley*, 107 F. (2d) 186, Certiorari denied 60 S. Ct. 377, 84 L. Ed. 519, 308 U. S. 622. And so, since the power of appointment was by these statutes reposed solely in the Attorney General, he alone could have dismissed the Petitioner, Baskin. It is significant that the latter was appointed by the Attorney General. *Baskins* v. *United States*, 32 Fed. Supp. 518, 520.

Since, for this reason, in addition to those others hereinabove set forth, Baskin was never lawfully removed, it follows that he is entitled to the salary of his office.

United States v. *Wickersham*, 201 U. S. 390, 50 L. Ed. 198, 26 S. Ct. 469; and other authorities cited *post*.

The District Court of the United States for the Eastern District of South Carolina adjudicated in this identical plaintiff's favor that he was an officer of the United States. (*Baskins* v. *United States*, 32 Fed. Supp. 518, D. C. E. D. S. C. 1940.) The Government was a party to that adjudication, and the Court of Claims was bound to have taken judicial notice of it in deciding this case. There was no appeal. Since, as *res adjudicata*, the plaintiff here was an officer, and his removal was unauthorized by law as above shown, the second position of the Court of Claims, that his suspension, leaving him in the status of an employee on leave without pay, did not give the plaintiff the right to demand the position from which he was removed, or the pay thereof, is completely met and answered with the case of *United States* v. *Perkins*, 116 U. S. 483, 29 L. Ed. 700, 6 S. Ct. 449, from which we quote as follows:

> "The object of this suit was to recover $100 as the salary to plaintiff as a cadet engineer of the navy from June 30, 1883, to September 1, 1883, at the rate of $600 per year, as provided by section 1556 Revised Statutes. Judgment rendered in his favor for that amount.
>
> "The plaintiff entered the Navy Academy as a cadet engineer in 1877 and graduated therefrom June 10, 1881. On June 26, 1883, he received a letter from the Secretary of the Navy giving him notice that, as he was not required to fill any vacancy in the naval service happening during the preceding year, he was thereby honorably discharged from the 30th of June, 1883, with one year sea pay as prescribed for cadet midshipmen in accordance with the provisions of the act of Congress approved August 5, 1882. He protested against this order as illegal, refused the pay, and regarded himself as continuing in the service, he sued for his pay subsequently accruing. The case differs from that of Redgrave just decided in one particular only; *that the claim is for pay after the al-*

leged discharge. The single question now raised as to that point is that, although the discharge may not be justified by the act of August 5, 1882, the Secretary of the Navy had lawful power to discharge him from the service at will. This authority is claimed on the ground that the plaintiff was not an officer in the navy service within the meaning of section 1229, R. S., which provides that 'no officer in the military or navy service shall in times of peace be dismissed from the service except on and in pursuance of the sentence of a court-martial to that effect, or in a commutation thereof', and that consequently the right to remove and discharge him from the public service is implied in the power of appointment.

"In reply to that position the Court of Claims in its opinion in the case said:

"In this view we cannot concur. That a cadet engineer like the claimant was a graduate and in the naval service we have already decided; that he was an officer is made manifest by the terms of the Constitution which provides that "Congress may by law vest the appointment of such inferior officers as they think proper in the president alone, in the courts of law or in the heads of Departments." Congress has by express enactment vested the appointment of cadet engineers in the Secretary of the Navy, and when thus appointed, they be-ame officers and not employees.'

" 'It follows that, as claimant was not found deficient at any examination and was not dismissed for misconduct under the provisions of Revised Statutes, paragraph 1525, nor upon and in pursuance of the sentence of a court-martial to that effect or in commutation thereof, according to Revised Statutes, paragraph 1229, *he is still in office* and is entitled to the pay attached to the same.'

"We adopt these views and affirm the judgment of the Court of Claims."

A *clerk* illegally suspended is entitled to the salary of his office during the period of his suspension.

Lellmann v. *United States,* 37 Ct. Cl. 128.

See also

McLean v. *United States,* 45 Ct. Cl. 95, and
Miller v. *United States,* 45 Ct. Cl. 509.

> "A regular and duly qualified employee in the classified civil service of the United States is entitled to the compensation attached by law to his position during the period of his wrongful suspension by a subordinate officer."
>
> *United States* v. *Wickersham,* 201 U. S. 390, 50 L. Ed. 798, 26 S. Ct. 469.

The *Wickersham case* was approved in *People* v. *Stevenson,* 272 Ill. 219, 111 N. E. 597, where a janitor at capitol was held entitled to pay for services from time of illegal dismissal by Secretary of State until legal dismissal by Civil Service Commission. See also *Ransom* v. *City of Boston,* 192 Mass. 307, 7 Ann. Cas. 733, 78 N. E. 485, and *Ransom* v. *City of Boston,* 196 Mass. 252, 253, 81 N. E. 1000, both holding veteran employed by city as laborer, and discharged without hearing as required by law, is entitled to wages; and *Foster* v. *Hindley,* 72 Wash. 660, 131 Pac. 198, holding sanitary inspector wrongfully deprived of his office by Mayor is entitled to salary.

In *Markus* v. *Duluth,* 138 Minn. 228, 164 N. W. 907, a *de jure* officer illegally removed was held entitled to compensation; in *Finneran* v. *Burlington,* 89 Vt. 6, 93 Atl. 256, a police officer illegally removed was held entitled to salary; and in *Tate* v. *Spokane* 150 Wash. 544, 273 Pac. 749, a laid-off civil service employee entitled to reinstatement was allowed a recovery of salary during period of wrongful separation from employment.

(3)

That terminating plaintiff's employment on grounds stated to be "for the good of the service" was illegal has been demonstrated in our discussion of the Court's basic ground No. 1 above, and need not be repeated here.

(4)

The position of the honorable Court of Claims that at the time plaintiff's appointment was terminated on January 15, 1936, he was not holding any position in the Government service from which he was entitled to any compensation is, we respectfully submit, fully answered in our disposition of their position No. 2, *supra.*

(5)

Laches.

Within a reasonable time, plaintiff filed suit in the District Court of the United States for the Eastern District of South Carolina. The Court of Claims does not seem to lay any special stress on the time that elapsed between the date of his discharge and the institution of that suit, but generally charges him with *laches* in asserting his claim after January 15, 1936 (R. 10). His action in the District Court in South Carolina while fruitless in monetary results showed diligence on his part. He was not a lawyer and did not know how to proceed. But the District Court decision at least adjudicated one useful, practical point in his favor, that he was an officer of the United States.

Delay in instituting suit may be excused where the matter in dispute has in the meantime been the subject of litigation. 21 Corpus Juris 242, citing (*inter alia*), *Illinois Grand Trunk R. Co.* v. *Wade,* 140 U. S. 65, 11 S. Ct. 709, 35 L. Ed. 342; *Pacific R. Co.* v. *Missouri Pac. R. Co.,* 111

U. S. 505, 4 S. Ct. 583, 28 L. Ed. 498; and *Burrows* v. *Interborough Metropolitan Co.*, 156 Fed. 389.

> "Delay pending other proceedings has been held excusable, not only where the termination of such proceedings was necessary for the ascertainment of facts or the establishment of rights and liabilities involved in the latter suit, *but also where the former suit had a similar object but proved unavailing.*" (Emphasis added) 21 Corpus Juris 242.
>
> "Thus the fact that plaintiff first commenced his suit in a federal court, which was dismissed on appeal for want of jurisdiction, is a circumstance tending to explain delay."
>
> *Hart* v. *Hawkins*, 3 Bibb (Ky.) 502, 6 Am. D. 666, cited in note 86 to 21 Corpus Juris, page 242.

The Court of Claims patently erred in applying the doctrine of *laches* at all; because that is strictly an equitable doctrine, whereas this is absolutely an action at law, in which it has no place whatever.

The very authority cited by the Court of Claims—*Arant* v. *Lane*, 249 U. S. 367, 371, 63 L. Ed. 650; 39 S. Ct. 293—shows that the doctrine is purely equitable.

Under these circumstances, the Court of Claims has completely nullified and made ineffective the six-year statute of limitations which Congress had provided for such cases. Title 28, Section 262, of the U. S. Code. What good is that statute, if claims are to be subjected to the equitable doctrine of *laches* and a much less time applied? Has the Court the repealing or veto power?

Title 28, Section 250 (Subdiv. (1) of the U. S. Code recognizes the jurisdiction of the Court of Claims "in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States *in a court of law, equity* or admiralty, if the United States were suable;" thus recognizing the distinction between law and equity and their separate application.

Rule 86 of the Court of Claims shows that it has a "*Law Calendar;* hence observes the distinction between, and the separate application of, law and equity, just as the statute was designed that it would do so.

There are, of course, numerous cases on record where relief against the Government has been denied because of *laches;* but we have found no decision of the United States Supreme Court, nor of the Court of Claims, which holds that *laches* may be applied *in a law case* to defeat the plain terms of the statute of limitations. In none of the cases we have found where the doctrine of *laches* was applied does it appear that the point was made and stressed, as we do here, or passed on, that the case at bar was a law case to be distinguished from one in equity. *Arant* v. *Lane, supra,* cited by the Court, was a proceeding for mandamus, to which equitable principles have always been applied by the courts; but no mandamus is involved here. This is a strict action for a debt—the equivalent of the common law *indebitatus assumpsit.*

The Alleged Issue of Title to Office.

The Court of Claims correctly decided this case as having jurisdiction, passing on the merits of the petition, without regard to any issue of title to office as destructive of its jurisdiction. This, and the further obvious reason that trial of title to office only arises when there are two or more contenders for the office, make it appear to us that citation of authority is unnecessary to show that the Court of Claims has jurisdiction to entertain this claim, which is founded both upon contract and upon laws of Congress.

For the Court of Claims to have placed upon certain of its decisions the interpretation sought by counsel for the Government in this case, that the Court will disown jurisdiction in every case in which the right to recover depends upon the establishment of title to office, would have been to have entirely nullified the effect of such decisions of this

Court as *Humphrey* v. *United States,* 295 U. S. 602, 55 S. Ct. 869, 79 L. Ed. 1611; *United States* v. *Knox,* 128 U. S. 230, 9 S. Ct. 63, 32 L. Ed. 465; *United States* v. *Perkins,* 116 U. S. 483, 6 S. Ct. 449, 29 L. Ed. 700; and *United States* v. *Wickersham,* 201 U. S. 392, 26 S. Ct. 469, 50 L. Ed. 798.

The Court of Claims correctly did no such thing, but took jurisdiction of and decided this case upon the merits of the facts presented by the petition.

Conclusion.

For the reasons presented, we respectfully submit that the judgment of the Court of Claims should be reviewed by this honorable Court and reversed, to the end that the plaintiff's case may at least be heard upon the facts thereof, and not stand determined on the face of the pleading.

Respectfully submitted,

MARION W. SEABROOK,
Sumter, South Carolina,
Counsel for the Petitioner.

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454607—42——1

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1041

JAMES CARLISLE BASKIN, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 6–11) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims (R. 11) was entered on January 5, 1942. The petition for a writ of certiorari was filed March 14, 1942. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

Petitioner was suspended from his position as a guard at a Federal penitentiary on a charge of "having written letters to officials of the Government criticizing the administration of prison affairs" and was subsequently discharged "for the good of the service." Twenty-one months after the discharge, petitioner sued in a District Court to recover the loss in salary, alleging that the suspension and discharge were illegal. The action was dismissed for want of jurisdiction and, sixteen months after the dismissal, petitioner instituted the present action in the Court of Claims to recover salary. The questions presented are:

1. Whether the action is barred by laches.
2. Whether petitioner's removal was lawful.

STATUTES INVOLVED

Section 6 of the Act of August 24, 1912, 37 Stat. 555, U. S. C., sec. 652, and Rule XII of the Civil Service Commission are set forth in the Appendix, infra, pp. 13–15.

STATEMENT

On August 1, 1941, petitioner filed a petition in the Court of Claims seeking to recover salary from January 15, 1936, on which date he was allegedly wrongfully dismissed from his position as guard at the United States Penitentiary at Lewis-

burg, Pennsylvania (R. 1–5). The facts, as stated in the petition, may be summarized as follows:

Petitioner, an honorably discharged soldier of the United States, was, from March 1, 1928, to about January 15, 1936, employed in the United States Prison Service, Department of Justice, having been appointed and classified after examination in accordance with regulations of the Civil Service Commission (R. 1).[1]

On September 3, 1935, while serving as a guard at the United States Penitentiary at Lewisburg, Pennsylvania, at an annual salary of $1,680.00, petitioner received a formal notice of suspension from the Warden (R. 1). The notice purported to be given pursuant to Rule XII of the Civil Service Commission, and the charge upon which the suspension was predicated was "having written letters to officials of the Government, criticizing the administration of prison affairs" (R. 1–2). Petitioner then filed a sworn reply to the charge stating that the letters were written

[1] As such a classified employee in the Civil Service, it is alleged that petitioner was entitled to the protection of Section 6 of the Act of August 24, 1912 (27 Stat. 555, 5 U. S. C., sec. 652) requiring that removals be only for cause and, as an honorably discharged soldier, that he was entitled to the protection of Title 5, Section 648 of the United States Code providing that in the event that the force in any executive department were reduced, no honorably discharged soldier whose rating is "good" shall be discharged or reduced in salary or rank.

by him in good faith and did not constitute a violation of Rule XII (R. 2). Petitioner was, nevertheless, suspended without a hearing and has never been permitted to resume his duties (R. 2).

On or about October 4, 1935, petitioner wrote a letter to the Director of the Bureau of Prisons expressing "his regret of the mistake he had made in criticizing the prison administration" (R. 2). In reply, he received a letter, dated October 8, 1935, from the Assistant Director of the Bureau in part as follows (R. 2):

> The Director has authorized me to say that he accepts your explanation of the transaction which resulted in your suspension, and that in connection with your efforts to secure a transfer he is willing to give you the best letter of recommendation he could consistently issue. I am enclosing a draft of the letter of recommendation he would be willing to give you.
>
> If you will send us your application for leave without pay, we will arrange to terminate your suspension, with the understanding that while you will be officially a part of the Prison Service, you do not report back for duty at Lewisburg, but retain the status of an employee on leave without pay pending your efforts to secure a transfer to some other branch of the service.

The enclosed letter of recommendation, subsequently signed by the Director, listed the various positions held by petitioner in the Prison Service,

and stated that "During this period of employment he has rendered faithful, conscientious service. Reports from his superior officers show him to be a competent employee" (R. 2–3).

In accordance with the suggestion contained in the Assistant Director's letter, petitioner applied, on October 11, 1935, for leave without pay, and on October 19, 1935, he received a letter from the Assistant Director confirming the arrangement and terminating the suspension (R. 3). The Assistant Director stated "We consider that the discipline administered Mr. Baskin through the medium of the suspension * * * is sufficient, * * *" (R. 3). Petitioner, being unable to secure a transfer, sought reinstatement as a prison guard, but was unsuccessful (R. 3). He consulted legal counsel, and in response to a request for information, his counsel was advised by letter of January 15, 1936, from the Assistant Director that petitioner's "time is up now, and his appointment is, therefore, being terminated for the good of the service" (R. 3).

Twenty-one months later, in September 1937, petitioner filed suit in the District Court of the United States for the Eastern District of South Carolina to recover his salary; the suit was dismissed on April 6, 1940, on the ground that the court was without jurisdiction of an action to recover the salary of a public officer (R. 4). Petitioner filed this action in the court below, in Au-

gust 1941, more than a year after the dismissal of the prior proceeding but as soon as he was able to obtain counsel (R. 4). The petitioner alleged a loss of salary from January 15, 1936, to the time of filing the petition, in the sum of $6,845.00, and prayed for judgment in that amount (R. 4–5).

On September 10, 1941, the United States filed a general traverse, but on September 24, 1941, with the approval of the court, the traverse was withdrawn and the Government filed a motion to dismiss "on the ground that said petition fails to set forth a cause of action within the jurisdiction of this Court" (R. 5). The motion to dismiss was sustained but on the ground that the petition failed to state a cause of action (R. 11).

ARGUMENT

In the court below, the Government urged in support of its motion to dismiss for lack of jurisdiction that petitioner's suit was one to try title to office and that in accordance with the decisions of the Court of Claims,[2] the suit should be dismissed for lack of jurisdiction. The court below, without expressly passing upon that contention, held that the petition did not state a cause of action in that petitioner had been properly sus-

[2] *Arant* v. *United States*, 55 C. Cls. 327, 338; *O'Neil* v. *United States*, 56 C. Cls. 89; *Richardson* v. *United States*, 64 C. Cls. 233; *Goodwin* v. *United States*, 76 C. Cls. 218, 223; *Barry* v. *United States*, 83 C. Cls. 413; *Curran* v. *United States*, 92 C. Cls. 66, 72–73.

pended and discharged by the proper Government officials in accordance with all statutory requirements and regulations of the Civil Service Commission (R. 9–10), and in that, in any event, petitioner was guilty of laches in asserting his claim (R. 10). The decision is correct and presents no question which warrants review by this Court.

1. An employee or officer of the United States who has been discharged must use diligence in asserting his right to the office or to the compensation attached to it. Failure to act diligently constitutes laches barring recovery. *Arant* v. *Lane*, 249 U. S. 367, 372; *Nicholas* v. *United States*, 257 U. S. 71, 76; *Norris* v. *United States*, 257 U. S. 77, 80–81. This is so because "Public policy requires that the Government shall be seasonably advised of the attitude of its officers and employees attempted to be displaced when they assert illegal removal or suspension as a basis for the recovery of the office or its emoluments" so that "proper action may be taken in the public interest." *Nicholas* v. *United States*, 257 U. S. 71, 76. Petitioner's contention (Pet. 28–30) that the doctrine of laches does not apply in an action in the Court of Claims because it is "strictly an equitable doctrine" (Pet. 29) is plainly mistaken. This Court has held that the doctrine and the underlying consideration of policy apply as well to actions in the Court of Claims to recover salary (*Nicholas* v. *United States*, 257 U. S. 71, 76; *Norris*

v. *United States*, 257 U. S. 77, 80–81) as to mandamus proceedings to recover the office. *Arant* v. *Lane*, 249 U. S. 367, 372.[3]

The delay in this case warrants the conclusion that the claim is barred by laches. The petition on its face shows that petitioner took no action for about twenty-one months after his discharge in September 1936, and did not institute this proceeding until sixteen months after the suit in the District Court was dismissed, five and one-half years after the discharge. The initial delay alone is more than that previously held by this Court to bar relief. *Arant* v. *Lane*, *supra*, at 372 (20 months); cf. *Norris* v. *United States*, *supra*, at 80 (11 months).

2. Even if seasonably filed, the claim is without merit. Section 6 of the Act of August 24, 1912, 37 Stat. 555, 5 U. S. C., sec. 652, provides that "no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be

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[3] The doctrine has been uniformly applied in the Court of Claims. *Morse* v. *United States*, 59 C. Cls. 139, 155; *Richardson* v. *United States*, 64 C. Cls. 233, 235; *Goodwin* v. *United States*, 76 C. Cls. 218, 234–235; *Hart* v. *United States*, 91 C. Cls. 308, 311–312.

allowed a reasonable time for personally answering the same in writing." Section 6 specifically provides that no hearing or trial shall be required except in the discretion of the officer making the removal. Section 1 of Rule XII of the Civil Service Commission embodies these provisions. Petitioner's removal was in accord with the statute and regulations.

Petitioner was given proper notice of the reasons for his removal, and an opportunity to answer. The petition discloses on its face that on September 3, 1935, petitioner received a formal notice of suspension from the Warden stating the charges preferred against him (R. 1–2). There is no suggestion that the letters and the objectionable matter therein were not identified with sufficient particularity to permit of answer; on the contrary, the petitioner alleged that he promptly filed a sworn reply with respect to the "letters mentioned" in the charges (R. 1–2). In view of the agreement as to petitioner's status following the suspension, further notice at the time of the discharge on January 15, 1936, was not required. The contention (Pet. 7, 22–23) that there was no finding that the removal would "promote the efficiency of the service" in accordance with the statute is without merit. The statement in the letter of discharge (R. 3) that the termination of petitioner's employment was "for the good of the service" was manifestly under-

stood and intended as the equivalent of a finding in the language of the statute.[4] And the courts may not independently determine whether the matters in the "letters mentioned" contained false or otherwise objectionable material justifying the removal. The finding of the government officials may not be disturbed unless in contravention of some statutory prohibition. *Keim* v. *United States*, 177 U. S. 290; *Eberlein* v. *United States*, 257 U. S. 82; *Taylor* v. *Taft*, 24 App. D. C. 95, writ of error dismissed 203 U. S. 461; *Levine* v. *Farley*, 107 F. (2d) 186 (App. D. C.), certiorari denied 308 U. S. 622; *Medkirk* v. *United States*, 44 C. Cls. 469, 481.[5]

Petitioner's contention (Pet. 8–9) that the charge, on which the finding was presumably based, is insufficient in law because of the pro-

[4] The petition on its face shows that the original notice of suspension was given pursuant to Rule XII (R. 1) which embodies the requirements of Section 6, and the term "for the good of the service" employed in the letter of discharge was presumably understood and intended by the officials as the equivalent of the statutory standard.

[5] The fact that petitioner was an honorably discharged soldier does not prevent his dismissal for just cause. *Keim* v. *United States*, 177 U. S. 290, 294–295.

vision of Section 6 prohibiting interference with the right to petition Congress or furnish information to members thereof is unfounded. The provision in question has no application to communications to others than members of Congress. *Levine* v. *Farley*, 107 F. (2d) 186 (App. D. C.) certiorari denied 308 U. S. 622. The charge petitioner was charged with was having written letters to "officials of the Government" (R. 1–2). There is no allegation that the letters mentioned in the charge were addressed to Congressmen and, in view of the presumption of official regularity, the burden was on petitioner to show by affirmative allegation that the statute was violated.[6]

CONCLUSION

The decision below was correct. There is no conflict of decisions, and the case presents no question of importance requiring the decision of this

[6] Petitioner's contention, now raised for the first time in this Court (Pet. 12–13, 24–27), that the discharge was illegal because not made by the Attorney General, affords no basis for review. Nowhere in the allegations of the petition is there any suggestion that the Director of the Bureau of Prisons was without authority to remove petitioner, or that the petitioner was discharged without the direction or approval of the Attorney General. The court below apparently did not construe the petition as raising this question and did not discuss it in its opinion and proceeded on the view that petitioner claimed only to have been discharged for insufficient cause. The petitioner made no motion for rehearing or a new trial and did not ask leave to amend the petition.

Court. For the foregoing reasons, therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
MELVIN H. SIEGEL,
ELLIS LYONS,
Attorneys.

APRIL 1942.

APPENDIX

Section 6 of the Act of August 24, 1912, 37 Stat. 555, 5 U. S. C., sec. 652, provides as follows:

> SEC. 6. That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Civil Service Commission also shall, upon request, be furnished copies of the same: *Provided, however,* That membership in any society, association, club, or other form of organization of postal employees not affiliated with any outside organization imposing an obligation or duty upon them to engage in any strike, or proposing to assist them in any strike, against the United States, having for its objects, among other

things, improvements in the condition of labor of its members, including hours of labor and compensation therefor and leave of absence, by any person or groups of persons in said postal service, or the presenting by any such person or groups of persons of any grievance or grievances to the Congress or any Member thereof shall not constitute or be cause for reduction in rank or compensation or removal of such person or groups of persons from said service. The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with.

Section 1 of Rule XII of the Civil Service Commission provides as follows:

REMOVALS AND REDUCTIONS

1. *Reasons to be furnished.*—No person in the classified service of the United States shall be removed therefrom except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, rea-

sons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Commission also shall, upon request, be furnished copies of the same.

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